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FABER UNION SDN BHD

v.

TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN PERUMAHAN DAN KERAJAAN TEMPATAN & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-376-2009]
C 31 JANUARY 2011

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Award - Application for judicial review to quash award - Late delivery of vacant possession - Tribunal's finding that cause of action arose from sale and*
D *purchase agreements - Whether tribunal erred in law - Rules of the High Court 1980, O. 53*

CONTRACT: *Sale and purchase of property - Sale and purchase agreements - Whether tribunal's jurisdiction confined to agreements - Brochures and oral representations - Whether reasonable for respondents*
E *to rely on applicant's representations - Letter of applicant - Whether applicant's notification on delay vitiates delivery period stipulated in agreements*

DAMAGES: *Assessment - Date of assessment of damages - Amendment*
F *of commencement date - Calculation of damages payable - Whether tribunal erred in decision - Whether time began to run from date of payment of deposit - Whether there was illegality, irrationality or procedural impropriety in granting award*

G This was an application for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the award of the 1st respondent ('the tribunal'). The tribunal allowed the claim of the 2nd to 10th respondents ('the respondents') for liquidated damages for late delivery of vacant
H possession under the sale and purchase agreements ('the SPA') entered into between the applicant as developer and the respondents as purchasers for the sale and purchase of properties ('the project'). The SPA were signed on 5 April 2006 and cl. 23(1) of the SPA provided that vacant possession shall be
I delivered within 24 months from the date of the SPA. Vacant

possession was delivered within the said period. The dispute was whether there was a late delivery of vacant possession. The applicant contended that vacant possession was delivered within the period stipulated under the SPA, whereas, the respondents contended that they were induced to purchase the properties based upon advertisements and oral representations made by the applicant's sales representatives informing them that the project was due to be completed in June 2006. The tribunal found in favour of the respondents and awarded damages for late delivery. The applicant claimed that the tribunal had acted in excess of its jurisdiction, had not taken into consideration relevant matters and that there had been procedural improprieties.

Held (dismissing the application):

(1) In its award, the tribunal rejected the applicant's submissions that its jurisdiction was confined to the four corners of the SPA. The tribunal had not erred in its finding that the cause of action arose from the SPA as it was clear that the applicant relied on cl. 23(1) SPA as a defence to the respondents' claim. There was uncontroverted evidence from the applicant's witnesses that they told the respondents that vacant possession would be delivered by June 2006. Further, there was a letter from the applicant notifying the respondents of the delay in completing the project. A representation that vacant possession would be delivered earlier than the specified date would not be inconsistent with cl. 23(1) SPA. There was no error in the decision of the tribunal that the respondents could reasonably be expected to rely on the applicant's representations in making their decision to purchase the properties. Furthermore, there were no exclusion clauses that were inconsistent with the SPA and to the detriment of the respondents for the applicant to rely upon. *SEA Housing Corp. Sdn Bhd v Lee Poh Choo.* (foll) (para 12)

(2) The applicant contended that the tribunal erred in amending the commencement date of the SPA to the date of payment of deposit. It was found that the tribunal had not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant was the date when the respondents paid their deposits. *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor; Lim Eh Fah & Ors v. Seri Maju Padu.* (foll) (para 13)

(3) The tribunal had considered relevant matters in its decision. The award did not suffer from the infirmities of illegality, irrationality or procedural impropriety. (para 14)

[Costs of RM1,000 awarded to the 2nd to 10th respondents.]

Case(s) referred to:

Cheong Bee Yong v. MBF Finance Bhd & Anor [2001] 1 CLJ 668 HC ***(refd)***

Faber Union Sdn Bhd v. Chew Nyat Shong & Anor [1995] 3 CLJ 797 SC ***(refd)***

Lim Eh Fah & Ors v. Seri Maju Padu [2002] 4 CLJ 37 HC ***(refd)***

SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 305 (Rep); [1982] CLJ 355 FC ***(foll)***

Tan Chee Wah lwn. Sri Damansara Sdn Bhd [2006] 7 CLJ 66 HC ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss. 16N, 16Y

Rules of the High Court 1980, O. 53

For the applicant - Dato' Ghazi Ishak (Nazeera Hanifa with him); M/s Ghazi & Lim

For the 2nd respondent - Richard Wee (HW Yip with him); M/s Richard Wee & Yip

For the 3rd-10th respondents - K Jayaratnam (Paari Perumal with him); M/s Jayaratnam & Partners

Reported by Melanie Murthy

JUDGMENT

Aziah Ali J:

Introduction

[1] This is an application for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the award of the 1st respondent, the Tribunal dated 10 November 2009 which allowed the respondents' claim for liquidated damages for late delivery of vacant possession under the sale and purchase agreements ("the SPA") entered into between the applicant as developer and the 2nd to 10th respondents ("the respondents") as purchasers for the sale and purchase of properties in a project known as 'Danau Villa Phase 1B' ("the project").

[2] On 20 January 2006 the respondents paid RM5,000 as deposit. On 16.2.2006 they paid the balance of the first 10% of the purchase price amounting to RM72,180. The SPA were signed only on 5 April 2006. Clause 23(1) of the SPA provides that vacant possession shall be delivered within 24 months from the date of the SPA. Vacant possession was delivered on 14 March 2007.

[3] The dispute is whether there was late delivery of vacant possession. The applicant contends that vacant possession was delivered within the period stipulated under the SPA. The respondents contend that notwithstanding the SPA, based on the applicant's brochures and representations made by the applicant's sales representatives, vacant possession was to be delivered by June 2006. The Tribunal found in favour of the respondents and awarded damages for late delivery. The applicant says that the Tribunal has acted in excess of its jurisdiction, has not taken into consideration relevant matters and there has been procedural improprieties.

Background

[4] According to the applicant's witness DW1 Ms Devika, the project was first launched in June 2004. But less than 50% of the units were sold. The project was re-launched in January 2006. In December 2005 the applicant distributed brochures to potential buyers of properties in the project. The brochure (encl. 3 exh. VN2 p. 13) states amongst others:

> Expected Date of Completion: June 2006

[5] According to the respondents the advertisement for the project as approved by the Controller of Housing states the completion date as 'June 2006'. Both the witnesses for the applicant, DW1 and Puan Noraini (DW2) agreed that they told purchasers that the expected completion date was June 2006. It is the respondent's case that relying on the brochures and the representations made to them, vacant possession would be delivered in June 2006.

[6] On 4 July 2006 the applicant sent letters to all purchasers including the respondents to inform them that there was a delay in completion of the project and the project was targeted to be completed by October 2006. DW3 Ong testified that only the

purchasers who bought the properties at the initial launch were compensated for late delivery but not the respondents as the applicant contends that vacant possession was delivered within 24 months from the date of the SPA.

[7] In the award at para. 6.7 the Tribunal found that the applicant had intention to complete the project by June 2006 and the respondents had a reasonable expectation that completion would be by June 2006. The Tribunal found that statements in a brochure can be said to be undertakings which the applicant as developer is bound to honour (*Cheong Bee Yong v. MBF Finance Bhd & Anor* [2001] 1 CLJ 668).

[8] For the applicant it is submitted that the jurisdiction of the Tribunal is limited by s. 16N of the Housing Development (Control and Licensing) Act 1966 ("the Act") only to a cause of action arising from a sale and purchase agreement. It is submitted that the Tribunal has acted in excess of jurisdiction as follows:

(a) considering issues on pre-contractual misrepresentation relating to the expected date of completion which is clearly beyond the jurisdiction conferred by the Act;

(b) determining the expected completion date based on the brochure and not based on the date in the SPA that has been mutually agreed by parties thereby abusing its jurisdiction;

(c) determining the amount of compensation contrary to legal provisions;

(d) amending the date of the SPA to the date the respondents paid the deposit thereby amending the completion date from 5 April 2008 to 31 July 2006;

(e) the Tribunal has amended the terms of the SPA as provided under Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ("the regulations").

[9] For the 2nd respondent it is submitted that the Tribunal has acted within its jurisdiction as s. 16Y of the Act confers express power upon the Tribunal to vary or set aside an SPA under the Act. The Tribunal has correctly held that the sale and purchase transaction should be read as a whole as the transaction involved

a series of events and documents. It is submitted that the importance of information and contents in the advertisement and/or brochures is emphasized by the fact that the applicant could not amend such information and contents without the approval of the Housing Ministry. The applicant had failed, refused and/or neglected to do so despite knowing of the inevitable delay in completion of the project. Therefore it is submitted that it is ludicrous to suggest that the Tribunal should confine its jurisdiction only to the SPA. Counsel for the 3rd to 10th respondents submits that the Tribunal has not erred in exercising its jurisdiction in considering the issue of representations made to the respondents as this issue arose out of the sale and purchase transaction between a home buyer and a licensed housing developer. Counsel submits that in interpreting a private agreement the court is not limited to the four corners of the agreement but may look at the implied intention of the parties and the background facts may be taken into consideration.

[10] It is submitted for the respondents that on 4 July 2006 the applicant had sent letters to the respondents informing the respondents of a delay in completion of the project and that the applicant was targeting completion by October 2006. It is submitted that if it is true that vacant possession was only to be delivered by 5 April 2008 then why was there a need to notify the respondents that the applicant intended to complete the project by October 2006 as opposed to June 2006? Counsel submits that the true interpretation of cl. 23(1) of the SPA is that vacant possession was to be delivered by June 2006. Therefore it is submitted that the Tribunal has not erred in finding that the date of delivery of vacant possession was 31 July 2006.

[11] Counsel cites the case of *Tan Chee Wah lwn. Sri Damansara Sdn Bhd* [2006] 7 CLJ 66. In that case the appellant entered into the sale and purchase agreement due to representations made by the respondent that vacant possession would be delivered within 15 months from the date of the sale and purchase agreement notwithstanding cl. 20 which provided that vacant possession would be delivered within 24 months from the date of the sale and purchase agreement. The representation was made by way of advertisement and by the respondent's sales representative before the appellant executed the sale and purchase agreement. The

A appellant decided to purchase the house based on those representations. The respondent also wrote to the appellant as follows:

> We are pleased to confirm that notwithstanding clause 20 of the
B Sale & Purchase Agreement dated 15.5.2000 ... we shall deliver Vacant Possession of the Property ... within (15) months from the date of the SPA.

Raus Sharif J (as His Lordship then was) found that it was clear that by advertisement and oral representation vacant possession
C would be delivered within 15 months from the date of the SPA. His Lordship found that although the effect of the representation and the letter was to contract out of the SPA, such contracting out is permissible. In support His Lordship cited the case of *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355;
D [1982] CLJ (Rep) 305 wherein the Federal Court said as follows:

> It would appear that only 'contracting out' in favour of the weaker party – ie, the purchaser might be countenanced by the Courts.

E **[12]** In its award the Tribunal rejected the applicant's submissions that its jurisdiction is confined to the four corners of the SPA. I find that the Tribunal has not erred in its finding that the cause of action arises from the SPA as it is clear that the applicant is relying on cl. 23(1) as a defence to the respondents' claim.
F Notwithstanding cl. 23(1), the respondents herein, like the appellant in *Tan Chee Wah*'s case, are contending that representations by way of advertisement and by way of oral representations were made by the applicant's sales representatives that the period of delivery of vacant possession has been
G shortened to June 2006 instead of April 2008 thus inducing them to purchase the properties. There is uncontroverted evidence from the applicant's witnesses that they told the respondents that vacant possession would be delivered by June 2006. Further there is the applicant's letter dated 4 June 2006 notifying the
H respondents of the delay in completion of the project. A representation that vacant possession would be delivered earlier than the specified date would not be inconsistent with cl. 23(1) of the SPA *(SEA Housing Corp. Sdn Bhd v. Lee Poh Choo, supra)*.

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I find no error in the decision of the Tribunal that the respondents can reasonably be expected to rely on the representations in making their decision to purchase the properties and that no exclusion clauses which are inconsistent with the SPA and to the detriment of the respondents may be relied upon by the applicant.

[13] The applicant contends that the Tribunal erred in amending the commencement date of the SPA to the date of payment of the deposit. The Tribunal relied on the case of *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797 wherein the issue for determination by Supreme Court is whether, in ascertaining the date of delivery of vacant possession of a building to be constructed, time started to run from the date payment of the booking fee was made or from the date of the signing of the sale and purchase agreement. In that case the deposit was paid on 17 February 1984 and the agreement was signed on 27 June 1984. The Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the signing of the sale and purchase agreement. The decision of the Supreme Court was followed in *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37. In that case the purchaser paid the deposit on 17 July 1992. The sale and purchase agreement was executed on 10 October 1992. Suriyadi Halim Omar J (as His Lordship then was) held that the respondent assumed the responsibility to fulfil its part of the bargain at the date the deposit was paid, ie, 17 July 1992, in effect being the date when the contract was struck, and not the date the deed of assignment was signed. Otherwise, the respondent could arbitrarily choose any date it favoured to execute the sale and purchase agreement which would certainly prejudice the purchaser. Thus I find that the Tribunal has not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant is the date the respondents paid the deposits.

[14] Having considered the award I am unable to agree with counsel for the applicant that the Tribunal has committed errors of law that warrants curial intervention. The Tribunal has considered relevant matters and has not taken into consideration

A irrelevant matters. The award does not suffer from the infirmities of illegality, irrationality or procedural impropriety. For the aforementioned reasons the application is dismissed. Costs of RM1,000 is awarded to the 2nd to the 10th respondent.

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